



November 19, 2012

EX PARTE

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09- 51, WT Docket No. 10-208

Dear Ms. Dortch:

On November 15, 2012, Scott Bergmann of CTIA-The Wireless Association (CTIA), David Cohen of the United States Telecom Association (USTelecom), Jill Canfield of the National Telecommunications Cooperative Association (NTCA) (“Associations”), Malena Barzilai of Windstream, Cathy Carpino of AT&T, Melissa Newman of CenturyLink, Alan Buzacott of Verizon, Grant Spellmeyer of US Cellular, Dennis Lawson of Golden West Telecommunications, and (by phone) Michael Skrivan of FairPoint, Christopher Nierman of GCI, Larry Lueck of Cellcom and Jim Ucci of SouthernLINC (“Industry Group”), met with Alex Minard of the Wireline Competition Bureau, Margaret Weiner, Susan McNeil, William Huber and Patricia Robbins of the Wireless Telecommunications Bureau, and Irene Flannery, Robert Finley and Geoffrey Blackwell of the Consumer and Governmental Affairs Bureau to discuss tribal engagement issues raised by the *USF/ICC Transformation Order*¹ and the Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund (“*Further Guidance*”).² The issues discussed were raised in the Petition for

¹ See *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 at 17868-69, para. 637 (2011) (*USF/ICC Transformation Order*), pets. for reconsideration pending; pets. for review pending sub nom. In re: FCC 11-161, No. 11-9900 (10th Cir. Filed Dec. 18, 2011).

² See *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, DA 12-1165 (rel. July 19, 2012).

Reconsideration and Clarification of USTelecom in the above-captioned proceeding³ and supported by comments filed in that proceeding by several members of the industry group.⁴

The Associations, which, combined, represent most high-cost universal service support recipients, noted their appreciation for the efforts of the Office of Native Affairs and Policy (“ONAP”) and the Bureaus to facilitate discussions between tribal governments and eligible telecommunications carriers (“ETCs”) that have an obligation to comply with tribal engagement requirements when they become effective. The Associations also expressed support for ONAP and the Bureau’s acknowledgement that the *Further Guidance* can and should be refined based on discussions with the industry and with tribal governments. However, the Associations and their members are concerned about both the overly-broad applicability and the substance of the tribal engagement rule and the *Further Guidance*.

The Associations stated that if ONAP and the Bureaus intend the *Further Guidance* to be binding on ETCs – that is, a long checklist of items against which an ETC could be audited and, in the event of noncompliance, penalized via reduced high-cost support payments⁵ – then ONAP and the Bureaus failed to comply with the Administrative Procedure Act’s notice and comment rulemaking requirements.⁶ The Associations recommended that the FCC clarify that the *Further Guidance* is intended to be a compilation of aspirational goals.

The Associations also expressed concern about the overly broad scope of the *Further Guidance* as well as the rule. They stated that both the *Further Guidance* and the rule should be limited to ETCs that receive new Connect America Fund support to fund broadband deployment on tribal lands (e.g., Tribal Mobility Fund support). They emphasized that funding must be provided to meet any mandated obligations. If the FCC fails to provide “specific, predictable, and sufficient” support to enable a carrier to deploy and maintain broadband service in high-cost tribal areas, it serves little purpose to mandate that the carrier hold broadband deployment discussions with tribal governments. The Associations asserted that it made little sense to compel a carrier whose support is being eliminated to discuss, for example, deployment plans with tribal governments, since these carriers may very well have no deployment plans. They also noted that the service areas of ETCs may include portions of tribal areas that are uninhabited and thus would have no currently existing facilities or planned deployment. Moreover, they explained that legacy access replacement support received by carriers, including IAS, ICLS and LSS, was not designed to enable recipients to deploy new services and thus it would be nonsensical to require these carriers to meet with tribal government to discuss, for example, how they use legacy IAS to lower subscriber line charges.

³ See Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 10-90 *et al.* (filed Aug. 20, 2012) (“Petition”).

⁴ See comments of CTIA, NTCA, Pioneer Cellular and United States Cellular Corporation, and AT&T.

⁵ See *Further Guidance* at para. 7 (citing *USF/ICC Transformation Order* at para. 637, which states that carriers that fail to comply with the engagement obligation “would be subject to financial consequences, including potential reduction in support...”).

⁶ See 5 U.S.C. 553(b), (c).

The Associations reminded ONAP and the Bureaus that the FCC has not sought Office of Management and Budget (“OMB”) approval for the tribal engagement rule or the *Further Guidance* (OMB approval is required for the *Further Guidance* if the information collection contained therein is intended to be mandatory, not aspirational). The Paperwork Reduction Act⁷ (“PRA”) requires the FCC both to seek public comment on the proposed collection of information and to submit the proposed collection for review and approval by OMB. Similarly, the *Further Guidance* did not contain a Regulatory Flexibility Act (“RFA”) analysis, required if the Commission intended the *Further Guidance* to be anything other than aspirational.⁸

Finally, the Associations and the Industry Group expressed concerns about the Commission’s failure to consider the compliance costs to implement the *Further Guidance*. For example, the Commission ignored key costs including (1) the costs to prepare tribal government-specific presentations; (2) the costs of involving senior company executives (in addition to sales and marketing personnel) in face-to-face meetings with tribal representatives; and (3) marketing costs, which according to the *Further Guidance*, including locating a retail presence within a tribal community, staffed by members of that community, as well as individually tailored advertisements and service offerings for each tribal community.

The Associations and the Industry Group agreed with suggestions by the Commission representatives at the meeting that further discussions on these issues would be helpful.

Sincerely yours,



David Cohen
Vice President, Policy
United States Telecom Association

cc: Geoffrey Blackwell
Robert Finley
Irene Flannery
William Huber
Susan McNeil
Alex Minard
Patricia Robbins
Margaret Weiner

⁷See 44 U.S.C. § 3501 *et seq.*

⁸See 5 U.S.C. § 691 *et seq.* The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857.